



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Shook's Heating & Cooling

File: B-224701

Date: September 24, 1986

DIGEST

Possibility that contracting officer may have based nonresponsibility determination on unsatisfactory results under prior contract, despite contract appeals board ruling that protester performed satisfactorily, does not in itself constitute the prima facie showing of fraud or bad faith necessary to invoke General Accounting Office review of negative determination of small business concern's responsibility.

DECISION

Shook's Heating & Cooling protests the Department of the Navy's determination that Shook's cannot satisfactorily perform, and thus is not a responsible prospective contractor, under invitation for bids (IFB) No. N62472-86-B-7720. We dismiss the protest.

In its protest, Shook's indicates that it is a small business firm. The Small Business Administration (SBA), not our Office, has statutory authority to review a contracting officer's finding of nonresponsibility and then determine conclusively a small business concern's responsibility by issuing or refusing to issue a certificate of competency (COC). 15 U.S.C. § 637(b) (1982); Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 19.6 (1985). Our Office will review an SBA determination whether to issue a COC only where the protester makes a prima facie showing of agency fraud or bad faith, or demonstrates that SBA failed to consider material information in reaching its decision. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(3) (1986); Midwest Security Agency, Inc., B-222424, Apr. 7, 1986, 86-1 C.P.D. ¶ 345.

It is not clear whether SBA yet has reviewed this matter. In any case, Shook's asks that this case be considered under the "fraud or bad faith" exception on the ground that the Navy may have based its nonresponsibility determination on prior contract problems which, Shook's claims, the Armed Services

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Board of Contract Appeals has ruled were not Shook's fault. We find that this exception does not apply here.

Establishing fraud or bad faith requires the presentation of virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester. The W.H. Smith Hardware Co., B-219327.4, Oct. 8, 1985, 85-2 C.P.D. ¶ 391. Shook's has presented no evidence that the Navy based its nonresponsibility determination on Shook's prior contract performance. More importantly, even if this prior performance was taken into account notwithstanding the Board's ruling, consideration of that factor alone does not constitute evidence of fraud or bad faith; it might be the case, for instance, that the contracting officer honestly disagrees with the Board ruling, or that, aside from the ruling, in his judgment Shook's currently does not have the capability to perform this particular contract. Whatever the exact circumstances, we find no basis in Shook's submission for interfering with SBA's authority in this matter.

The protest is dismissed.

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for

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